No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

Appeal from the Court of Appeal of the State of California Second Appellate District

APPELLANTS' BRIEF

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QUESTIONS PRESENTED

This appeal presents the following questions under the United States Constitution:

Does the Unruh Civil Rights Act, Cal. Civ. Code § 51, construed by the California Court of Appeal to require the admission of females to all-male local Rotary clubs, unconstitutionally infringe the First Amendment associational rights of the members of such clubs, where there is an average membership of 46, selective membership requirements, an official and genuine policy of discouraging the the use of membership for commercial gain, and a principal purpose of promoting fellowship for the non-commercial and non-economic objectives of securing the voluntary, uncompensated participation of business and professional men in a variety of civic, eleemosynary and charitable service activities?

Is the Unruh Act, construed by the California Court of Appeal as applicable to such clubs, unconstitutionally vague and overbroad as an instrument for regulating memberships protected by First Amendment freedom of association?

PARTIES

Appellants are Board of Directors of Rotary International and Rotary District 530. Appellees are Rotary Club of Duarte ("Duarte"), Mary Lou Elliott and Rosemary Freitag.[1]

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[1]In accordance with Supreme Court Rule 28.1 counsel states that Rotary International may be considered the "parent" of Rotary District 530, Rotary Club of Duarte, and all other Rotary Districts and local Rotary clubs.

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APPELLANTS' BRIEF

OPINIONS BELOW

The Memorandum of Decision of the Superior Court of the State of California for the County of Los Angeles was issued on January 28, 1983. It is not reported but is printed as Appendix A to the Jurisdictional Statement. The Statement of Decision of that court was filed on March 21, 1983 and is also unreported but is printed as Appendix B to the Jurisdictional Statement. The opinion of the Court of Appeal was filed on March 17, 1986 and modified on April 9, 1986. It appears in 178 Cal. App. 3d 1051 (1986), and is

printed as Appendix C to the Jurisdictional Statement. The California Supreme Court issued its order denying appellants' petition for review on June 18, 1986. Said order is printed as Appendix D to the Jurisdictional Statement.

JURISDICTIONAL GROUNDS

The Notice of Appeal was filed in the Court of Appeal on July 15, 1986. A copy thereof is printed as Appendix E to the Jurisdictional Statement. The time within which to docket this appeal expired on September 16, 1986, and timely docketing was made. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101(c). Appellants squarely challenged the consitutionality of the Unruh Act, if construed to require the admission of females to local Rotary clubs, and the California Court of Appeal squarely sustained its validity, as so construed. The California Supreme Court declined to review the decision of the Court of Appeal. Jurisdiction under 28 U.S.C. §1257(2) is supported by the decisions in *Orr* v. *Orr*, 440 U.S. 268 (1979) and *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979).

> We have held consistently that a state statute is sustained within the meaning of §1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. [441 U.S. 434, 441]

Appellees, in their Motion to Dismiss or Affirm, incorrectly asserted that appellants did not draw in question the validity of the Unruh Act on the ground of its being repugnant to the Constitution of the United States as

required by Section 1257(2).[2] The trial court clearly understood appellants' contention that application of the Unruh Act to local Rotary clubs would make the statute void under the federal Constitution, and agreed with it:

> . . . to require Rotary International *pursuant to the Unruh Act* to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public.
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> • • •
>
> Where, as here, there is no persuasive proof that exclusion from membership in the purely private organizations comprising Rotary has imposed a material or substantial economic constraint upon any woman, it would be a violation of the defendants' rights to liberty of association *under the United States Constitution* for the California Courts *or Legislature* to require the defendant organizations to accept women in contradiction of the male only membership restrictions which have frequently and recently been reaffirmed democratically by the members of Rotary. . . . [J.S. App. B-9, B-13] [emphasis added]

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[2]Although appellants filed a brief in opposition for the specific purpose of rebutting appellees' statements in this respect, that brief was filed October 30 and was possibly not considered by the Court before it issued its order on November 3, postponing consideration of jurisdiction to the hearing on the merits. Consequently, the question of jurisdiction is addressed again in accordance with Rule 16.8.

The Court of Appeal held the Unruh Act applicable to Rotary and rejected Rotary's contention that such application would be invalid:

> International argues that forcing it to excuse compliance with the male-only-membership policy would violate the associational freedoms afforded it by the federal Constitution.
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> • • •
>
> We therefore conclude that application of the Unruh Act to International does not abridge its freedom of intimate or expressive association. [J.S. App. C-33, C-38]

Petitioning the Supreme Court of California for review, appellants again raised the issue:

> Did the Court of Appeal's application of the Unruh Act abridge the First Amendment freedom of association privileges appurtenant to the membership policies of Rotary International and its local California club? [Petition for Review at 2.]

The Supreme Court denied the petition, leaving intact the Court of Appeal's decision. Thus, the constitutionality of the Unruh Act was drawn in question from the inception of this case; the trial court construed it as inapplicable, avoiding the need to hold it unconstitutional. The Court of Appeal, however, met the challenge head-on and held that the Act applied to appellants and was constitutional nevertheless. Jurisdiction clearly lies under 28 U.S.C. § 1257(2).

> Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire into how and when the question of the validity of the statute was

> raised when such question appears to have been actually considered and decided by that court. [*Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U.S. 182, 185-186 (1945)]

Even if this were not so, however, it is clear that this is a case where appellants claimed the constitutional right of freedom of association and such claim was denied by the Court of Appeal. As appellees recognize, in such cases a petition for certiorari under 28 U.S.C. § 1257(3) is appropriate, and this Court may treat the jurisdictional statement as a petition for writ of certiorari. *Local 926, International Union of Operating Engineers*, 460 U.S. 669 (1983); *Palmore* v. *U.S.*, 411 U.S. 389 (1973). For the reasons set forth at length in appellants' jurisdictional statement, this case should be heard by the Court on the merits so that vitally important issues of national significance can be resolved, whether on appeal or by the grant of a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the constitutionality of the California Unruh Civil Rights Act under the First and Fourteenth Amendments to the United States Constitution. [J.S. App. H]

The Unruh Act, Cal. Civ. Code § 51, provides in pertinent part:

> All persons within the jurisdiction of this State are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

In addition, the pertinent provisions of California Civil Code § 52 are as follows:

> Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 . . . is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars ($250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 . . .

STATEMENT OF THE CASE

Facts

In the instant case, the trial court made findings of fact, supported by substantial evidence, which clearly distinguish local Rotary clubs from the Jaycees. The California Court of Appeal, without disagreeing with most of the trial court's specific findings, nevertheless disagreed with its conclusions of ultimate fact and held that local Rotary clubs are business establishments within the meaning of that term in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), and that "A similar conclusion is mandated in this case." [J. S. App. C-37]. [3]

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[3]Since First Amendment rights are implicated, this Court will make an independent review of the facts found by the California courts. *In re Primus*, 436 U.S. 412, 434 (1978). To assist in this review, the evidence is discussed at some length. A discussion of California law regarding the precedence which findings of a trial court should be given over contrary resolutions of conflicting evidence appears at page 9, n.4, of the Jurisdictional Statement.

Rotary is a worldwide association of local Rotary clubs. In August, 1982 there were 19,788 local clubs in 157 different countries with a total membership of approximately 907,750. Thus, the average membership of a local club was 46. An individual Rotarian is a member of a local club, not of Rotary International; all local clubs are members of Rotary International. [J. S. App. C-4 - C-5; Rotary Basic Library, Focus on Rotary, vol. 1, p. 1]. Each club is co-equal with every other club, and each club, when it joins, agrees to abide by the rules contained in the standard Rotary club constitution, which it adopts upon admission, as well as the constitution and by-laws of Rotary International. [Pigman deposition, J. S. App. G-12; J. S. App. C-6 - C-7].

Membership is restricted to males. [J. S. App. B-5, C-6]. Rotary does not permit the use of its name by women's clubs, nor may such clubs become members of Rotary International and participate in its conventions and other forms of administration. [1981 Manual of Procedure, pp. 155-156].

Membership in Rotary is by invitation only. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 1-2; Pigman deposition, J. S. App. G-49].

Rotary utilizes a "classification principle" which, with certain exceptions, limits the number of members from each classification of business or profession within the community that can be admitted into active membership in a local Rotary club. [J. S. App. B-4, C-6; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 67, Club Service, vol. 2, p. 7; Pigman deposition, J. S. App. G-49].

Rotary International has adopted Recommended Club By-Laws for local clubs which set forth the procedure for admission of new members. The name of a candidate for

admission must be proposed to the local club by the membership committee or by an active, senior active, or past service member. The sponsor submits the candidate's name to the club's board of directors on a membership proposal card. The board sends the card to the classifications committee and the membership committee. The former makes sure that there is an open classification of business or profession and that the prospective member's business or profession is accurately described by that classification. The latter evaluates the candidate from the standpoint of character, business and social standing, and general eligibility. To avoid embarrassment, the candidate's name is kept confidential throughout this preliminary procedure and the candidate himself is not told of these investigations.

If the reports of both committees are favorable and the board approves them, the candidate's name, business and classification are published to the members. If there is no written objection received by the board within 10 days, the candidate becomes a member. If there is such an objection, membership requires a further approving vote by the board. [Rotary Basic Library, Club Service, vol. 2, pp. 29-32].

An active member of a local Rotary club must work in a leadership capacity (owner, partner, manager, *et al.*) in the business or profession in which he is classified. [J. S. App. C-6, n. 4; Rotary Basic Library, Club Service, vol. 2, p. 32; Pigman deposition, J. S. App. G-56]. A retired man cannot become an active member, since he is not engaged in a business or profession. [Rotary Basic Library, Club Service, vol. 2, p. 15].

Membership in Rotary is always personal; it does not represent a company membership. [Pigman deposition, J. S. App. G-16]. Each local Rotary club seeks its members from the business and professional leaders within a clearly defined

geographical community approximating a single municipality in size. There is generally only one local Rotary club in any given geographical community. [J. S. App. B-2; 1981 Manual of Procedure, p. 205]. An active member must live or work within the club's territory. [J. S. App. C-6, n. 4; Rotary Basic Library, Club Service, vol. 2, p. 32]. There is no provision by which a member of a Rotary club may transfer his membership from one club to another. [1981 Manual of Procedure, p. 135].

The foregoing undisputed facts led the trial court to find that Rotary clubs are highly selective in their membership, and that such membership "is neither solicited from nor is it available to the public generally." [J. S. App. B-4, B-5]. The Court of Appeal agreed that "the membership criteria set forth by International and by which the local clubs must abide is selective. . . ." [J. S. App. C-35].

Another important aspect of Rotary club membership, in addition to its selectivity, is that governance is in the hands of the members. Each local club is governed by a board of directors elected by the membership. [Rotary Basic Library, Focus on Rotary, vol. 1, p. 70]. Rotary's Council on Legislation, which is the mechanism by which any local Rotary club may propose changes to the constitution, is comprised of representatives of the clubs in all Rotary districts. It meets every three years, and delegates are democratically elected by mail ballot or at a district conference. [Pigman deposition, J. S. App. G-13].

> The object of Rotary is to encourage and foster the ideal of service as a basis of worthy enterprise and, in particular, to encourage and foster:
>
> First: The development of acquaintance as an opportunity for service. [1981 Manual of Procedure, p. 160].

The General Secretary of Rotary International, Herbert Pigman, testified that fellowship and the camaraderie and ease of relationships that develop among a group of men who meet weekly is an important component of their effectiveness in rendering service. [Pigman deposition, J. S. App. G-44]. To ensure that the undivided interest and energy of Rotarians are addressed to Rotary's membership obligations, Rotarians are urged not to belong to other service clubs. [1981 Manual of Procedure, p. 135].

Rotary meetings are not open to the public, and the local Rotary club "is intended to be really a *club* — a body of men who are knit together in bonds of personal friendship and service." [Pigman deposition, J. S. App. G-25; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 67-68] [emphasis in original]. Joint meetings with other service clubs are discouraged. [1981 Manual of Procedure, pp. 155-156].

Based on the above facts, the trial court found that the importance of associational congeniality among Rotarians is substantial. [J. S. App. B-3]. The Court of Appeal agreed that "fellowship and service to the community play a very important part in the Rotary organization . . ." [J. S. App. C-35 – C-36].

Rotary's male-only policy originated many years ago. As Rotary grew nationally and internationally, the policy grew into a fundamental and broadly accepted principle of Rotarian operation, cherished both for the quality of fellowship and camaraderie which it provided, and also to a material extent because of the demonstrated fact that, as a male-only organization, Rotary has been able to operate effectively over a worldwide base of varied cultures and social mores. [Pigman deposition, J. S. App. G-50 – G-53].

A vote of two-thirds of the members of the Council on Legislation is required to approve an amendment to the

Rotary constitution. Proposals to change the male-only rule were defeated in 1972, 1977 and 1980. In 1980, the proposed amendment was debated for three hours and obtained the favorable vote of only 40% of the delegates. [Pigman deposition, J. S. App. G-41 – G-42]. Indeed, Duarte's expulsion for violation of the rule was approved by the 1978 annual convention by a vote of 1060-34. [Clerk's transcript 217 FFF].

The trial court found that the issue of the compelled admission of women into local Rotary clubs "is of widespread and deep concern among Rotarians both in the United States and in widely different cultures throughout the world," and that "the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures. . . ." [J. S. App. B-6 – B-7]. The Court of Appeal agreed that "the male-only-membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis. . . ." [J. S. App. C-30].

Finally, while it is true that in the early days of Rotary, there was a motivation of business advantage to membership, this consideration was soon abandoned in favor of the concept of "Service Above Self." [Pigman deposition, J. S. App. G-34 – G-35; Rotary Basic Library, Focus on Rotary, vol. 1, p. 2]. The 1981 Manual of Procedure specifically provides: "Any use of the fellowship of Rotary as a means of gaining an advantage or profit is foreign to the spirit of Rotary." [1981 Manual of Procedure, p. 154]. This policy dates from at least as early as 1934. [Pigman deposition, J. S. App. G-36]. The rules of Rotary in this particular respect "are jealously guarded by the general body of its members." [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 60].

In addition, the official Rotary directory contains a prohibition against using it or making it available for use as a commercial mailing list. [Pigman deposition, J. S. App. G-62].

The trial court was thus able to find that "For many years the official and genuine policy of Rotary International has been to discourage the seeking or giving of preferential business custom among Rotarians or the use of Rotarian membership for commercial gain." [J. S. App. B-3]. The trial court also found that "Rotary has for many years consciously, genuinely, and effectively abandoned use of the 'classification' system as a device for encouraging professional business relationships among Rotarians." [J. S. App. B-4].

What Led to This Appeal

In 1977 Duarte admitted Donna Bogart, Mary Lou Elliott and Rosemary Freitag as active regular members in contravention of the constitution and by-laws of Rotary International. [J. S. App. C-7]. After full compliance with its notice and hearing requirements, Rotary International, acting through its Board of Directors, revoked Duarte's charter and terminated its membership. [J. S. App. C-8]. On January 8, 1979, Duarte and two of the three women, Elliott and Freitag, filed an amended complaint for injunctive and declaratory relief against the Board of Directors of Rotary International, Rotary District 530 and the district governors of District 530 for the fiscal years 1977-1978 and 1978-1979. The two individual defendants were later dismissed.

In their amended complaint, plaintiffs sought (1) to enjoin the defendants from declaring Duarte's charter null and void, from compelling delivery of the charter to any

representative of Rotary International, and from enforcing those provisions of Rotary International's constitution and by-laws restricting membership in local clubs to males and (2) a declaration that the acts of defendants violated the Unruh Act.[4]

The matter was tried before the trial court without a jury, defendants asserting, among other defenses, that, if the Unruh Act required local Rotary clubs to admit females, it would violate their associational rights under the First and Fourteenth Amendments to the United States Constitution. The trial court entered judgment in favor of defendants, finding that Duarte, Rotary International and District 530 were not "business establishments" within the meaning of the Unruh Act, and that they were not organizations providing "goods, services and facilities" to their members. It further found that to preclude enforcement of Rotary's male-only policy would unconstitutionally infringe the associational rights of many Rotarians and "would materially affect the operation of Rotary not merely outside the State of California but outside the United States." The trial court also found that plaintiffs had not proven that enforcement of the male-only policy and expulsion of Duarte from Rotary International had caused any damage to Duarte or to the individual plaintiffs or women in general.

The Court of Appeal reversed, finding that both Duarte and Rotary International were business establishments within the meaning of the Unruh Act. The Court of Appeal held that, as business establishments, Duarte and Rotary

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[4] Plaintiffs also alleged a violation of Article 1, section 8 of the California Constitution. The trial court held that this constitutional provision requires state action and was inapplicable. The Court of Appeal did not rule on this issue.

International were guilty of "arbitrary" sex discrimination, and that to enforce the Unruh Act against them did not violate the First and Fourteenth Amendments. It ordered reinstatement of Duarte as a member of Rotary International and a permanent injunction against enforcement of the male-only membership restriction. The California Supreme Court denied a petition to review the decision of the Court of Appeal.

SUMMARY OF ARGUMENT

The heart of the case

This is an extremely significant case involving individual rights under the United States Constitution. It is *not,* however, a case which involves the rights of women under that Constitution, nor is it, properly viewed, a case which involves the rights of women at all. The rights of women and of men, *per se*, are not involved. What is involved is the right of an individual, of either sex, to join with other persons of his or her own choosing for purposes of fellowship and service to society.

The California Court of Appeal has ruled that a local Rotary club, made up of a group of males who have joined together in a selective manner for such purposes, may be compelled, under the Unruh Act, to admit women because admission to membership may afford economic or other benefits to such women. If this decision is upheld on appeal, no group of individuals, no matter how selective their membership criteria, may exclude from membership females or any other class of person, where such benefits flow from membership. This, of course, will be true in every case. The well-established and vitally important First Amendment right of freedom of association will have been destroyed by a well-meaning but overly intrusive state policy expressed in a vague and overly broad statute.

In the recent case of *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court held that an *unselective* organization of men engaged in the *public sale of memberships* which made available to members *services otherwise commercially available* was not entitled to constitutional protection against the application of a similar, but narrower, statute. The reasoning of the Court expressed there, as well as a long line of cases defining First Amendment rights, compels a decision here reversing the Court of Appeal.

Freedom of intimate association

In *Roberts*, this Court reaffirmed the basic principle that associations "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," "reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." Factors held to be relevant "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." [468 U.S. at 620]

Local Rotary clubs are generally small in size; their purpose is the rendition of voluntary service; their policies specifically prohibit their use for personal aggrandizement; they have selective membership admission policies; camaraderie and fellowship are extremely important aspects of membership; and they are governed by popularly elected boards of directors. The relevant tests set forth in *Roberts* are fully met, and such clubs and their members are entitled to freedom of intimate association. The Constitution imposes a controlling restraint on the State's power to regulate the selection of club members.

Freedom of expressive association

Additionally, local Rotary clubs are entitled to protection of their freedom of expressive association. As both Justice Brennan's majority opinion and Justice O'Connor's concurring opinion in *Roberts* recognize, "civic" and "charitable" activities, as well as "participation in community service" constitute expressive activities entitled to First Amendment protection. While it is clear that the right to associate for expressive purposes is not absolute, any abridgement of the right must be justified by a compelling state interest, and must be no broader than required to accomplish such compelling goals. Local Rotary clubs are not "engaged in acts of invidious discrimination in the distribution of publicly available goods, services and other advantages." [468 U.S. at 628] The very selectivity in membership which is an important factor in sustaining their right to freedom of intimate association demonstrates that state concerns "with respect to gender discrimination in the allocation of publicly available goods and services" are not implicated here. [468 U.S. at 609]

Moreover, the "continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, . . . and judicial interference with this balance . . . would risk a material and harmful disruption of the cooperative integrity of Rotary International both inside and outside the State of California. [J.S. App. B-6—B-7; Pigman deposition, J.S. App. G-46—G-53] Under such circumstances, to require local Rotary clubs to admit women as full voting members would constitute an infringement of associational rights far exceeding any state interest.

Vagueness and overbreadth

Finally, independent of the fact that applying the Unruh Act to local Rotary clubs unconstitutionally infringes substantive rights to freedom of association, that Act, as it has been construed by California courts, is both unconstitutionally vague and overbroad. It prohibits any form of "arbitrary" discrimination, and imposes significant penalties upon violators. What is "arbitrary" to one may be well-reasoned and principled to another. In California, a decision which is both "rational" and "taken in 'good faith' " may nevertheless be "arbitrary." *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 89 n. 19, 707 P.2d 212 (1985).

In addition, the statute has been held to apply to any entity with "sufficient businesslike attributes." It has been held to apply to such disparate entities as a nonprofit condominium owners' association, the Boy Scouts, a Boys' Club, and local Rotary clubs. Under such a statute a person of common intelligence must necessarily guess at the meaning and application of the law. The Unruh Act fails to meet the first essential of due process.

Furthermore, in reaching any act of arbitrary discrimination engaged in by a commercial or noncommercial entity with businesslike attributes, the Unruh Act extends its scope far beyond any compelling state interest in prohibiting discrimination in the course of furnishing goods, services or facilities to clients, patrons or customers. The Constitution does not permit such limitless intrusion upon protected First Amendment rights.

ARGUMENT

I

Rotary clubs are selective in their membership, are governed by their members, have well-defined policies restricting participation to members, and are clubs in which fellowship in service to the public is of prime importance; they and their members are entitled to protection of their freedom of intimate association.

Since the decision of this Court in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), there can be no question as to whether or not the First Amendment guarantees to an individual the right to freedom of association.

> . . . the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as an element of personal liberty.
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> * * *
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> Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safe-

> guards the ability independently to define one's identity that is central to any concept of liberty. [468 U.S. at 617-719] [citations omitted]

In *Gilmore* v. *City of Montgomery, Alabama*, 417 U.S. 556 (1974), cited in *Roberts* in support of the foregoing principles, Justice Blackmun, in part quoting Justice Douglas, put it succinctly:

> 'Government may not tell a man or woman who his associates must be. The individual can be as selective as he desires.' The freedom to associate applies to the beliefs we share and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change. [417 U.S. at 575] [citation omitted]

The philosophical underpinnings for freedom of association may be traced to DeTocqueville, who viewed it as so fundamental as to have a source in natural law:

> The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore, the right of association seems to me by nature almost as inalienable as individual liberty. [DeTocqueville, *Democracy in America*, at 178 [G. Lawrence trans. 1966)]

Professor Kauper has noted that the right to associate includes the right not to accept unwanted members. [P. Kauper, *Civil Liberties and the Constitution* 104-106 (1962)] In *Roberts*, this Court agreed:

> Freedom of association therefore plainly presupposes a freedom not to associate. [468 U.S. at 623]

Despite these accepted principles, however, the Court held that the Jaycees could constitutionally be compelled to admit women despite their desire to restrict membership to

males. As the Court quite properly noted, "an association lacking [peculiarly personal] qualities — such as a large business enterprise — seems remote from the concerns giving rise to this constitutional protection." [468 U.S. at 620]

Justice Brennan, while declining to map the terrain between constitutionally protected intimate association and "the most attenuated of personal relationships," cited Justice Powell's concurring opinion in *Runyon* v. *McCray*, 427 U.S. 160 (1976), and noted that the factors to be considered "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." [468 U.S. at 620] Justice Powell had earlier stated that relationships "that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted . . ." [427 U.S. at 189] Rotary clubs meet Justice Brennan's tests; local Jaycees chapters did not.

The local chapters of the Jaycees were "large and basically unselective groups." [468 U.S. at 621] Furthermore, women affiliated with the Jaycees attended meetings, participated in projects, and engaged in many of the organization's social functions. Indeed, nonmembers of both genders regularly participated in activities "central to the decision of many members to associate with one another." [468 U.S. at 621] Therefore, the Jaycees lacked the "distinctive characteristics" which could "afford constitutional protection to the decision of its members to exclude women." [468 U.S. at 621]

In *United States Jaycees* v. *McClure*, 305 N.W.2d 764 (Minn. 1981), the Minnesota Supreme Court had earlier held that the Jaycees could not properly exclude women

from membership because it was a "public" as opposed to a "private" organization, such as Kiwanis International.

Judge Lay, dissenting in *United States Jaycees* v. *McClure,* 709 F.2d 1560 (8th Cir. 1983), agreed with the Minnesota court's analysis:

> The Minnesota court denotes as one criterion for the public-private distinction the use of standards in selecting new members and a formal procedure by which membership is restricted. The membership of the Kiwanis group is limited so that the number of members in any one given occupational classification cannot exceed 20% of the total active membership. Such a restriction circumscribes membership boundaries and would serve in itself to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex. [709 F.2d at 1582]

In *Roberts,* the validity of this distinction was approved:

> Like the dissenting judge in the Court of Appeals, however, we read the illustrative reference to the Kiwanis Club, *which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria,* as simply providing a further refinement of the standards used to determine whether the organization is "public" or "private." [468 U.S. at 630] [emphasis added]

In the instant case, the undisputed evidence is that local Rotary clubs on average have only 46 members. Prior to its admission of women in 1977, Duarte's membership had at times fallen below 20 members. [Stipulation, J.S. App. F-3.] Membership criteria are more selective than those of Kiwanis, strict admission policies are adhered to, and fellowship in service is the principal purpose of Rotary. Members may not freely transfer membership from one club to another. Governance of the clubs is in the members.

Rotary club meetings are not open to the public, nor are joint meetings with other service clubs approved. Not only are women not admitted to membership; there are no official women's affiliates entitled to use the Rotary name or participate in the activities of Rotary International. Rotary's male-only membership is prized both because it enhances the fellowship which is at the heart of Rotary, and because it enables Rotary to operate effectively throughout a world of varied cultures and mores. These facts, none of which is in dispute, clearly place local Rotary clubs on the opposite side of the line from the Jaycees.

The trial court's findings of fact, which led it to the conclusion that Rotary is quite unlike the Jaycees, while there is "substantial similarity between Rotary and Kiwanis" were never directly contradicted by the Court of Appeal. Rather, that court stressed the large number of local Rotary clubs which make up Rotary International and held that "membership in International" is far from "continuous, personal and social." [J.S. App. C-27] Appellees, in their Motion to Dismiss or Affirm, also focus on the total membership of all Rotary clubs. [Motion, pp. 14-15] Some discussion of this point is required.

The constitutional right to freedom of association belongs in the first instance to an individual. In protecting such right, his or her membership in a specified "club," "group," or "organization" must be protected. In the instant case, the constitutional issue is whether a local Rotary club can, under the Unruh Act, constitutionally be compelled to open its membership to women. Rotary International, as such, has no individual members. Rotary International is an association of local Rotary clubs which, through democratically elected representatives, has chosen to require that all local clubs wishing to call themselves "Rotary" must abide by the same rules. One of those rules is the male-only

membership rule. When the California Court of Appeal held that such rule cannot be enforced in the case of Duarte, because to do so would constitute arbitrary discrimination, the effect of such decision was to invalidate the rule for all California Rotary clubs. It is the constitutional right of the members of a local Rotary club to exclude women that is to be decided here, and it is the facts concerning such local clubs that are significant here, just as it was the facts concerning the "local chapters of the Jaycees" which doomed their plea for constitutional protection. At the local club level, there can be no question but that the factors of "size, purpose, policies, selectivity, congeniality" stressed by the Court in *Roberts* clearly indicate that sufficient "distinctive characteristics" exist to entitle such clubs to constitutional protection of their membership policies.[5]

When the California Court of Appeal turned its attention to the characteristics of the local clubs, its most significant comment was that "the community services performed by local Rotarians clearly take place in 'public view.'" It also stated that "While there is personal and social interaction among Rotarians, the commercial aspects of the relationship clearly preclude a conclusion that they are 'truly private.'" [J. S. App. C-28]. The absence of significant commercial aspects to Rotarian membership is discussed in detail hereafter.[6]

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[5]*Cf. Kiwanis International* v. *Ridgewood Kiwanis Club*, Nos. 86-5199 and 86-5278 (3d Cir. December 3, 1986) (Third Circuit focused on characteristics of the local club, not the international organization).

[6]The court misread *Roberts* in this regard. Commercial distribution of publicly available goods and services may affect an organization's right to freedom of expressive asso-

With respect to the fact that Rotarians do not perform their public services in secret, the words of the New York Court of Appeals in *Kiwanis Club of Great Neck* v. *Board of Trustees of Kiwanis International*, 41 N.Y. 2d 1034 (1977), should be borne in mind:

> Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive, *or of the quality*, as to permit governmental supervision of essentially private activity in the constitutional sense. [41 N.Y. 2d at 1034] [emphasis added]

The California Court of Appeal simply failed to grasp the vital difference between closely-knit members of a private organization rendering public service out of a sense of dedication and the sale of services to the public by a public business. [*See* Pigman deposition, App. G-26 - G-27, G-33 - G-34, G-45].

Additional guidance, if any were needed, may be obtained from a review of the "private club" exemption under the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq.*, which, in reliance upon the Thirteenth Amendment, prohibits racial discrimination. No similar amendment and no similar federal statute supports the rights of appellees. Nevertheless, analogies may be drawn between organizations entitled to exemption under the federal law and those entitled to constitutional protection against a comparable state statute.

Perhaps the most famous decision interpreting the "private club" exemption is that of the three-judge court in

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ciation. The mere presence of business benefits in a selective private association, however, does not cause the members to lose their right to freedom of intimate association. *See* discussion *infra* at 28-33.

Cornelius v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974). The court, reviewing a large number of cases, set forth the factors to be considered to determine whether an organization is a "private club." These were (a) the selectiveness of the group in the admission of members, (b) the existence of formal membership procedures, (c) the degree of membership control over internal governance, particularly with regard to new members, (d) the history of the organization, *i.e.*, was it created or insubstantially modified to avoid civil rights legislation, *i.e.*, is it a sham, (e) the use of club facilities by nonmembers, (f) the substantiality of dues, (g) whether the organization advertises, and (h) the predominance of the profit motive. The court stressed that the most important factor, embodied in the first three variables, is membership practices. In the instant case, local Rotary clubs are selective in the admission of members; they operate in accordance with formal membership procedures; and admission is by vote of the members. As the Elks, in *Cornelius*, were protected from the reach of federal civil rights acts in excluding blacks from membership, local Rotary clubs are entitled to First Amendment protection from the reach of the Unruh Act and other like state laws. As Justice Rehnquist, speaking for the Court in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), might well have said:

> [The local Rotary club] is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. [407 U.S. at 171]

The importance of preserving the rights of the members of such organizations has been recognized by commentators who agree with the result in *Roberts* but would not wish it extended to selective, private membership organizations.

> When the last all-women's private school is forced to close its doors, when the law no longer tolerates the existence of all-Norwegian or all-Catholic clubs, when the Boy Scouts and the Girl Scouts finally merge, even those calling themselves egalitarians may stop to shed a tear or two for pluralism lost.
>
> It is important to realize that nothing strikes closer to the heart of American pluralism than a law which tells an association who it must accept as a member. The power to change the membership of an association is "the power to change its purpose, its programs, its ideology, and its collective voice." It is a power so dangerous that it should not be exercised even in many situations where it is believed that discrimination practiced by an association is wrong. [Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 Mich. L.R. 1878, 1902 (1984)]

Local Rotary clubs and their members are fully entitled to claim the benefits of First Amendment protection for their right to freedom of intimate association.

II

Rotary clubs are not engaged in the commercial distribution of publicly available goods and services; elimination of their democratically reaffirmed male-only membership policy would cause severe and irreparable harm; no compelling state interest justifies interference with their freedom of expressive association.

In addition to the freedom to restrict membership in constitutionally protected private associations which consti-

tutes an "element of personal liberty," the Court, in *Roberts*, also noted:

> . . . we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. [468 U.S. at 622]

Even though the Jaycees lacked the distinctive characteristics of size and selectivity which might have entitled the organization to the first type of associational freedom, the Court recognized that "civic, charitable, lobbying, fundraising" activities carried on by the Jaycees are "worthy of constitutional protection under the First Amendment." [468 U.S. at 627.] Justice O'Connor, concurring, noted that:

> Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement. [468 U.S. at 636]

Justice O'Connor turned for illustrations to the Girl Scouts and the Boy Scouts and their handbooks. She might well have cited the objects of Rotary.

Freedom of expressive association extends, not just to organizations also entitled to freedom of intimate association, but to any organization which possesses genuine expressive associational purposes and the need for such protection. Thus, the NAACP, with membership criteria far less selective than those of Rotary, has time and again been held entitled to protection for its objectives, *i.e.*, ". . . to advance the interests of colored persons . . . and to increase their opportunities for . . . employment." *NAACP* v. *Alabama, ex rel., Patterson*, 357 U.S. 449, 451 (1958). Indeed, advancement of the economic interests of its members is

sufficient to afford an associational group First Amendment protection. *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, 389 U.S. 217 (1967); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

As Justice Douglas, who perhaps wrote more opinions on the subject than any other Justice, put it:

> The right of "association," like the right of belief . . . is more than the right to attend a meeting; *it includes the right to express one's attitude or philosophies by membership in a group* or by affiliation with it or by other lawful means. *Association in that context is a form of expression*; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful. [*Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965)] [emphasis added]

In *Roberts*, this Court upheld a Minnesota statute "eliminating discrimination and assuring its citizens equal access to publicly available goods and services," as applied to the Jaycees. In reaching this conclusion, the Court was governed by its finding that the Jaycees organization was engaged in offering "goods," "privileges" and "advantages" to the general public, but excluding women. The Minnesota Supreme Court had held that "The product being sold is membership in an organization whose aim is the advancement of its members." *United States Jaycees* v. *McClure*, 305 N.W.2d 764, 769 (1981)

This Court accepted the findings of the Minnesota court and held:

> . . . acts of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages cause *unique evils* that government has a compel-

> ling interest to prevent — wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce *special harms distinct from their communicative impact,* such practices are entitled to no constitutional protection. [468 U.S. at 628] [emphasis added]

The differences between Rotary and the Jaycees in this regard are significant and controlling. The Jaycees was a public commercial organization with incidental associational activities. Rotary is not. The trial court found that Rotary is not "an organization engaged in providing goods, services, and facilities to its members as clients, patrons, or customers." [J.S. App. B-9] Rotary membership "is neither solicited from nor is it available to the public generally." [J.S. App. B-5] Its business benefits are "incidental to the principal purposes of the association which are to promote fellowship for *non*-commercial and *non*-economic objectives and to secure the voluntary uncompensated participation of business and professional men in the aforesaid 'service' activities." [J.S. App. B-3] [emphasis in original] Rotary members do not sell services or purchase services through membership; they render service *pro bono publico.* [Pigman deposition, J.S. App. G-26 — G-27, G-33 — G-34, G-45]

The Court of Appeal did not directly address the constitutional requirement that an organization otherwise entitled to First Amendment protection must be engaged in discriminatory distribution of publicly available goods, services and other advantages for the state's interest in preventing such discrimination to become sufficiently compelling to justify abridgement of the organization's rights. Rather, it merely determined that both local Rotary clubs and Rotary International were "business establishments" within the meaning of the Unruh Act. With respect to Rotary Interna-

tional, the court focussed on "business-like" organizational structure, its financial operations and its publication of an official directory. [J.S. App. C-16—C-22] As to the local clubs, the Court of Appeal accepted as factual that "[t]oday, official policy promulgated by International through its Board 'specifically prohibits any attempt to use the privilege of membership for commercial advantage." Nevertheless, it held that "[s]ubstantial business benefits regardless of whether they are of a primary or secondary concern must be considered," and asserted that "the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers," [J.S. App. C-23, C-24, C-26] In support of its conclusion, the Court cited the testimony of four Rotarians that they "felt" or "believed" that they would obtain business benefits by belonging to Duarte or another local Rotary club and that they either deducted their dues for federal income tax purposes or had them paid by their employers. No evidence was presented of *any* specific benefits obtained by any of these individuals or their employers. The fact that the General Secretary of Rotary International was required to belong to a local Rotary club and that he deducted his dues as a business expense is, of course, irrelevant.

The Court of Appeal did not refer to the admission of the two female plaintiffs "that they did not join the Duarte Club for the express purpose of promoting their business or professional careers," and "that they did not feel that they had been impeded in the pursuit of their business and/or professional careers or financially damaged by any actions of Rotary International." [Stipulation, J.S. App. F-4]

More important, however, is the undenied and undeniable fact that Rotary policy explicitly prohibits use of membership for the financial or business advancement of members. Justice Stevens elegantly expressed the control-

ling principle when, speaking for the Court in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), he held that unauthorized improper acts by a few members of an organization contrary to its policy do not entitle the government to infringe the First Amendment rights of the group.

> A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. [458 U.S. at 934]

In *Kiwanis Club of Great Neck* v. *Board of Trustees of Kiwanis International*, 374 N.Y.S.2d 265 (1975), *aff'd*, 41 N.Y.2d 1034 (1977), plaintiffs contended that Kiwanis was largely a business organization, with valuable commercial contacts made through membership, and that women were put on an unequal footing in the business community by being unable to join. Evidence was presented that members stated their name, occupation or profession and firm name at the beginning of each meeting, that employers paid the dues for their employees, and that some members had developed substantial business through contacts made by means of membership. The trial court, after reviewing the objects of Kiwanis as set forth in its constitution, concluded that "[t]heir declared objectives certainly cannot be construed, on their face, as having any commercial implications." [374 N.Y.S.2d at 267] The court then went on to say:

> The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club. There can be no doubt that membership in a golf club, for example, may be used by some members to promote business connections and that certain employers of such members might even pay their dues. It is also

> conceivable that there are some who join a charitable or religious organization and become active therein, because of selfish or commercial benefits. Should the activities of some individual members be sufficient to convert such organization itself into a commercial enterprise? [374 N.Y.S.2d at 268]

The court did not discuss whether or not Kiwanis had an explicit policy against commercialization, but it is clear that Rotary does. If the testimony of dissident members of a private club that, despite an official policy to the contrary, they had motives of commercial self-aggrandizement in joining, were sufficient to destroy the protected freedom of association of the rest, no club would be safe from attack. The trial court here correctly noted that the female plaintiffs in this case "would have the Court nullify existing membership restrictions so that women could further violate Rotarian precepts by seeking commercial exploitation of Rotarian membership." [J. S. App. B-7] The trial court also correctly stated that even if Rotary were a commercial club explicitly rendering economic services to its members, that fact would not justify compelling it to share those services "indiscriminately with any member of the public who desires membership." [J. S. App. B-12] As noted above, groups formed for the economic benefit of their members have frequently been held entitled to First Amendment protection. The key issue is whether the group engages in "gender discrimination in the allocation of publicly available good and services." [468 U.S. at 625]

Even the California Court of Appeal was compelled to recognize that Rotary is not public. In holding that the Unruh Act requires local Rotary clubs to admit women to membership, it said:

> It [the Unruh Act] does not require International to change its objectives or to open membership to the

> *entire public at large*, nor does it invalidate its "inclusive, not exclusive," *selective* membership requirements. [J. S. App. C-2] [emphasis added]

Evidently, the Court of Appeal accepted as facts (i) that Rotary is not open to the public at large, and (ii) that it has selective membership requirements. Further, it evidently believed that neither of such facts constitutes an act "of invidious discrimination in the distribution of publicly available goods, services and other advantages," which causes "unique evils that government has a compelling interest to prevent." [468 U.S. at 628] Only the exclusion of women from membership was condemned. But once it is seen that Rotary clubs are not commercial organizations engaged in distribution of "publicly available goods, services and other advantages," requiring admission of women to membership fails utterly to further a state interest so compelling as to overcome the rights of the members of such clubs to both freedom of intimate and of expressive association. As this Court noted in *Roberts*:

> . . . when the State interferes with individuals' selection of those with whom they wish to join, freedom of association in both of its forms may be implicated. [468 U.S. at 618]

In *Roberts*, not only did the Court find a compelling state interest in preventing invidious discrimination in the distribution of publicly available goods and services, it was also able to find that admission of women to Jaycees membership as a means of preventing such discrimination "abridges no more speech or associational freedom than is necessary to accomplish that purpose." [468 U.S. at 629] It noted that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views." [468 U.S. at 627]

As it had when considering the Jaycees' claim to freedom of intimate association, the Court pointed out:

> . . . the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best. [468 U.S. at 627]

Here, on the other hand, the record establishes that meetings are not open to the public, that joint meetings with other service clubs are discouraged, and that women have no place in the official Rotary organization. The trial court expressly found that the admission of women to membership in local California clubs "would comprise a material interference with deeply felt choices of associational preference of many Rotarians" and that since "continued successful worldwide operation of Rotary is dependent on a delicate balance of divergent attitudes in diverse cultures," "judicial interference with this balance . . . would risk a material and harmful disruption of the cooperative integrity of Rotary." [J.S. App. B-6 – B-7]

The Court of Appeal agreed that the evidence "supports the trial court's finding that the male-only membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis," but concluded that this was insufficient to support a finding that "the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives." [J. S. App. C-30 – C-

31] The Court was moved by what it believed to be "arbitrary and blatant acts of sex discrimination against the women of the state." [J. S. App. C-31] But in striking down Rotary's male-only membership requirement, and requiring proof of ruin to Rotary, the California court did violence to the First Amendment which protects associational rights against *any* abridgement in the absence of a compelling state interest. Since Rotary is not offering "goods," "privileges," or "advantages" to the public at large, excluding only females, such compelling state interest in enforcing the most drastic of remedies—invalidation of membership policies—simply does not exist.

> . . . as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. [*Democratic Party of U.S.* v. *Wisconsin*, 450 U.S. 107, 124 (1981)]

Rotary, Kiwanis, the Lions, Zonta, the Girl Scouts, the Boy Scouts and the Boys' Clubs of America, like hundreds of other selective membership organizations with single-sex membership policies which are not engaged in the commercial distribution of publicly available goods and services, are entitled to the shield of the First Amendment to protect such policies regardless of whether they are regarded as wise or as invidiously discriminatory.

In the instant case, the State of California believes sex discrimination in private associations to be harmful to women, if not to the entire citizenry of the State. Therefore, it asserts the right to proscribe it. But if this were all that were required to abridge First Amendment rights, those rights would indeed be illusory, for any association of which the state did not approve could be legislated out of existence to

advance the state's interest in eliminating the disapproved activity.

The California courts in this and other cases[7] have elevated egalitarian goals above the constitutional rights of all citizens. This Court should reaffirm those rights, apply them to the members of local Rotary clubs, and reverse the decision in this case.

III

The Unruh Act is both vague and overbroad

Appellees incorrectly assert that the vagueness and overbreadth of the Unruh Act are not before this Court. It is evident that the trial court, in reaching its decision that the Unruh Act was inapplicable to Rotary clubs, was influenced by its belief that, if it were, it would be overbroad:

> Were the Unruh Act applicable to the membership policy of Rotary, it would not merely eliminate selectivity as to women; it would eliminate virtually *any* discretion in the selection of members. [J. S. App. B-13] [emphasis in original]

In appellants' brief to the Court of Appeal, it was explicitly contended:

> An even more serious potential for vagueness and overbreadth is that the Unruh Act (unlike the Minnesota statute) does not limit prohibited discrimination to race, color, creed, sex and other categories specifically noted in the statute; rather it prohibits substantially *any*

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[7] *Curran* v. *Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712 (1983) (Boy Scouts must admit homosexual to leadership position); *Isbister* v. *Boys' Club of Santa Cruz*, 40 Cal.3d 72, 707 P.2d 212 (1985) (Boys' Club must admit girls).

> selectivity among customers .... This may be an appropriate regulation for the clientele of shopping centers, apartment houses, motels, gas stations, and coffee shops. But it is a blunt instrument when applied to organizations like Rotary where voluntary fellowship and congeniality are of the essence, or to any other organization entitled to First Amendment freedoms wherein "precision of regulation must be the touchstone in an area touching our most precious freedoms." *Elrod* v. *Burns*, 427 U.S. 347, 363 (1976). "It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP* v. *Button*, 371 U.S. 415, 435 (1963). [Brief at 26]

Appellants submit that they are fully entitled to raise the issues of vagueness and overbreadth, and that the Unruh Act, as construed by the California courts in other cases and in this case, is both.

As this Court said in *Roberts:*

> The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [468 U.S. at 629] [citation omitted]

Vague laws offend several important values, as Justice Marshall noted in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972):

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police-

> men, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [408 U.S. at 108-109]

Although each case involving allegations of vagueness clearly must stand upon its own facts, guidance may be obtained from the tests set forth in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926), cited in *Roberts*.

> . . . the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, or as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 92, "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." [269 U.S. at 391-392] [citations omitted]

The *Cohen Grocery* case cited in *Connally* involved the Food Control Act of 1917, which made it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The Court struck it down, saying:

> Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in

> the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against . . . to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. [255 U.S. at 89-90]

A few other examples may be of some use. "The requirement that an activity be 'wholesome' before it is subject to approval is unconstitutionally vague." *Shamloo* v. *Mississippi State Board of Trustees,* 620 F.2d 516, 524 (5th Cir. 1980). A statute prohibiting cancellation of a motor vehicle dealer's franchise "unfairly, without due regard to the equities of said dealer and without just provocation" was invalidated in *General Motors Corporation* v. *Blevins,* 144 F. Supp. 381 (D. Colo. 1956), and, similarly, a statute prohibiting a motor vehicle dealer from "having indulged in an unconscionable practice relating to said business." *Trail Ridge Ford, Inc.,* v. *Colorado Dealer Licensing Board,* 543 P.2d 1245 (Colo. 1975). The Colorado Supreme Court commented:

> "Unconscionability" is a concept that brings forth certain general feelings in the minds of all of us. The parameters of those feelings and reactions, however, vary widely as between individuals and what is "unconscionable" could well vary from Board to Board. [543 P.2d at 1246]

With these decisions in mind, an analysis of the Unruh Act as construed by the California courts clearly indicates that it must fall. As the Court of Appeal correctly noted, the California Supreme Court, in *In re Cox,* 3 Cal.3d 205, 212, 474 P.2d 992 (1970), established the principle that the Act

interdicts "all arbitrary discrimination by a business enterprise." The types of discrimination listed in the Act were there held to be "illustrative, rather than restrictive, indicia of the type of conduct condemned."

The question then becomes, does the term "arbitrary" have a technical or other special meaning well enough understood for persons of common intelligence to know what discriminatory conduct is and is not lawful, or has it been so construed as to render it an intelligible standard, as this Court required in *Connally?* An objective analysis indicates that the answer is a resounding "No."

"Arbitrary," according to the first definition in *Webster's Dictionary of the English Language Unabridged* (Encyc. ed. 1977), is "not governed by principle; depending on volition; based on one's preference, notion, or whim." A statute which does no more than prohibit "arbitrary" conduct, *i.e.*, conduct based on "one's preference, notion, or whim" clearly leaves the decision as to whether or not a particular action is "arbitrary" to the discretion or judgment of the court. As stated in *Grayned,* it is precisely this delegation of a basic policy matter to judges and juries on an *ad hoc* and subjective basis that causes a statute to be unconstitutionally vague.

It would, of course, be possible for an otherwise vague statute to be made precise by judicial interpretation, but this is not the case with the Unruh Act. In *In re Cox,* 3 Cal.3d 205, 212, 424 P.2d 992 (1970), the Court stated what might appear to be a useful rule: "this broad interdiction of the act is not absolute; an organization may establish reasonable regulations that are rationally related to the services performed and facilities provided." However, as will appear, this apparent restriction is now without meaning.

In *Marina Point, Ltd.* v. *Wolfson,* 30 Cal.3d 721, 640 P.2d 115 (1972), a rental apartment building sought to justify its policy of excluding children on the ground that children "as a class" are "noisier, rowdier, more mischievous and more boisterous" than adults. The California Supreme Court rejected the contention that it was reasonable for the landlord to "seek to achieve its legitimate interest in a quiet and peaceful residential atmosphere by excluding all minors from its housing accommodations, thus providing its adult tenants with a 'child free' environment." The court held that exclusion of an entire class for *any* reason was "arbitrary."

At the same time, however, the *Marina Point* court stated that "age qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment." [30 Cal. 3d at 742-743]

In *Curran* v. *Mt. Diablo Council of the Boy Scouts of America,* 147 Cal. App. 3d 712 (1983), the prohibition against exclusion of any class of person was expanded further:

> Nor can an exclusion be justified only on the ground that the presence of a class of persons *does not accord with the nature of the organization or its facilities.* [*Id.* at 733] [emphasis added]

In that case, exclusion of a homosexual from a leadership position in the Boy Scouts was held unjustifiable. But, an earlier case, *Marsh* v. *Edwards Theatres Circuit, Inc.,* 64 Cal. App. 3d 881 (1976), where the court said, " . . . section 51 and the remedies provided in section 52 have no application to discrimination against the physically handicapped," remains the law in California.

Finally, in its most recent pronouncement on the subject, the California Supreme Court, in *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985), virtually destroyed the concept of "reasonable regulations that are rationally related to the services performed and facilities provided." Ruling that it is impermissible to restrict membership in a boys' club to boys, even though the purpose of the club is to combat juvenile delinquency, and boys are four times more likely than girls to get into trouble with the law, the court said:

> Nor can we accept Justice Kaus' suggestion that the Club has obeyed the Act because its decision to devote its resources to the greater delinquency problem it perceives among male youth is "rational" and taken in "good faith." *Marina Point* made clear that "reason" and "good faith" are not enough to avoid a finding of "arbitrary" discrimination. Our opinion condemned the adults-only policy there at issue even to the extent it rested on *true* assumptions about the general difficulties of living with children . . . Were good faith and bare rationality sufficient to permit group discrimination, the Act would have little meaning. [40 Cal.3d at 89 n.19]

The Unruh Act thus prohibits some forms of discrimination but not others; and "reason" and "good faith" will not be sufficient to preclude a finding that a decision is "arbitrary." The strong dissents in both *Marina Point* and *Isbister* reveal that even Supreme Court Justices cannot readily determine what is safe conduct under the Unruh Act[8]. The Act provides for treble damages, injunctive relief, and the awarding of attorneys' fees, but affords no protection to parties unjustly accused of its violation. Such a statute

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[8]*Cf. Martin* v. *International Olympic Committee*, 740 F. 2d 670 (9th Cir. 1984) (Ninth Circuit noted ambiguity in California courts' interpretation of scope of Unruh Act).

simply cannot stand. As the California Supreme Court itself has held:

> . . . language which attempts to draw a line separating proscribed conduct from conduct which is either protected or not otherwise proscribed is on dangerous ground when it must depend on qualifying words such as "reasonable" or "substantial" to define the line beyond which proper conduct becomes criminal. [*People* v. *Barksdale*, 8 Cal. 3d 320, 328, n.3, 503 P. 2d 257 (1972)]

Further, the Unruh Act is also unconstitutionally vague in requiring that all persons be accorded "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind." In *Alcorn* v. *Anbro Engineering, Inc.*, 2 Cal.3d 493, 500, 468 P.2d 216 (1970), the California Supreme Court held that the Unruh Act is limited to discrimination by a business establishment "in the course of furnishing goods, services or facilities to its clients, patrons or customers." However, it no longer appears that an organization need be furnishing goods, services or facilities to customers to be within the grasp of the Unruh Act. Any organization with "businesslike attributes," whatever they may be, can be caught.

In *O'Connor* v. *Village Green Owners Assn.*, 33 Cal.3d 790, 662 P.2d 427 (1983), cited with approval by the Court of Appeal in this case, the California Supreme Court held that a nonprofit homeowners' association of a condominium development violated the Unruh Act when it attempted to enforce an age restriction in the covenants, conditions and restrictions of the development. The Court held that the association was a "business establishment" within the scope of the Act because it had "sufficient businesslike attributes." All of such attributes related to services performed for the owner-members of the association, and, as Justice Mosk

pointed out in his dissent, the association could hardly be said to be a commercial enterprise serving customers, clients or patrons.

In *Curran* v. *Mt. Diablo Council of the Boy Scouts of America,* 147 Cal. App. 3d 712, 732-733 (1983), the California Court of Appeal held that the term "business establishment" governed by the Unruh Act "includes all commercial and noncommercial entities open to and serving the general public." It held that the Boy Scouts was such an entity, stressing the facts that the national organization owns the copyright of the Boy Scout emblem and uniform, which are franchised for retail sale, and that the national organization publishes and sells a great variety of books. Having found "that the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act," the court held that exclusion of a homosexual from a leadership position was arbitrary and prohibited by the Act. It is evident that this did not involve discrimination in supplying goods or services to clients or customers.

In the instant case, the Court of Appeal stressed at great length the "businesslike attributes" of Rotary International. [J.S. App. C-16 - C-22] As to the local Rotary clubs, the court stressed what it believed to be the "business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers." [J.S. App. C-22 - C-27] However, the Court of Appeal held that, applying the Unruh Act to Rotary so as to require the admission of women "does not require [it] . . . to open membership to the entire public at large . . ." [J.S. App. C-2]

Thus, we see that, not only may virtually any type of entity be found to be a "business establishment," it is not possible to determine whether or not protection may be obtained from a finding, as the trial court made here, that an

entity is not engaged in "furnishing goods, services or facilities to its clients, patrons, or customers." *Alcorn*, 2 Cal.3d at 500. It is even impossible to know whether it is necessary for the entity to be "open to and serving the general public," *Curran*, 147 Cal. App. 3d at 732, or whether it is sufficient that "a particular group" be excluded, even if that group consists of everyone but boys from 8 to 18. *Isbister*, 40 Cal.3d at 96 (Kaus, J., dissenting). Note that the Court of Appeal here held that even though Duarte was a "business establishment," it was not required to open its membership to the "entire public at large"—only to women. [J.S.App. C-2]

In addition, the construction which the California Court of Appeal gave to the Unruh Act in this case injects material uncertainty into California's "choice of law" rules regulating foreign corporations. Heretofore, California has applied the law of the domicile, rather than California law, for adjudicating internal policy disputes of foreign corporations. *Signal Oil & Gas Co.* v. *Ashland Oil & Refining Co.*, 49 Cal.2d 764, 774, 322 P.2d 1 (1958); *American Center, etc.* v. *Cavner*, 80 Cal.App.3d 476, 485 (1978). In this case, the court departed from these principles to apply California law, but gave no guidance as to the criteria governing its decision, although it found *Order of Travelers* v. *Wolfe*, 331 U.S. 586 (1947), not controlling. This alone renders the Unruh Act unconstitutionally vague.

Finally, in addition to being irreparably vague, the Unruh Act is unconstitutionally overbroad. It does not confine the scope of its regulation to those limited and particular private membership practices which California might have a compelling interest to regulate.

The Court of Appeals asserts that California has a compelling interest in "abolishing sex discrimination by

business establishments". [J.S. App. C-37] That compelling interest is described as guaranteeing equal access to "substantial business benefits". [J.S. App. C-29] But in fact the statute was here construed as mandating admission to Rotarian membership of women who admitted that they had no compelling economic interest in being members of a Rotary club. [J.S. App. B-7] Moreover, the statute is not limited to suppressing sex discrimination. It has been construed as prohibiting *all* "arbitrary" membership restrictions, i.e. all membership restrictions based upon the "preference, notion, or whim" of the members. Such preferential (i.e. "arbitrary") discretion in selecting one's associates is the fundamental essence of freedom of association. Prohibiting "arbitrary" membership policies effectively obliterates *all* freedom of association.

Moreover, freedom of association guarantees make private membership restrictions presumptively immune from state regulation. The state or other entity attacking the membership policy has the burden of proof and persuasion in justifying any curtailment of such exercises of First Amendment rights. *Healy* v. *James*, 408 U.S. 169, 183-185 (1972); *Britt* v. *Superior Court*, 20 Cal. 3d 844, 855-856, 574 P.2d 766 (1978). Applying the Unruh Act to such policy turns this constitutional presumption of validity on its head and requires the organization to shoulder the burden of proving a "compelling societal need" to keep anyone out. *Marina Point*, 30 Cal. 3d at 743. Imposing such a burden of justification upon the exercise of freedom of association goes beyond constitutionally legitimate regulatory powers.

While the test enunciated in *Alcorn* that the Unruh Act is limited to discrimination "in the course of furnishing goods, services or facilities to [an entity's] clients, patrons or customers," would suffice to meet the constitutional

requirement expressed in *Roberts* that the entity be engaged in "acts of invidious discrimination in the distribution of publicly available goods, services and other advantages," application of the Unruh Act to any entity with "sufficient businesslike attributes" which is unable to show a "compelling societal need" for its exclusionary practices renders it too broad, too applicable to constitutionally protected activities to be sustained.

Finally, a statute which, as here, directly regulates First Amendment expression must be neutral with respect to the content of the expression. Where state regulations are not neutral, even regulation of commercially oriented expression will be unconstitutional. *Bolger* v. *Youngs Products Corp.*, 463 U.S. [illegible] 63); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980). Here, instead of being neutral, the public accommodation statute has a bias against *any* restriction of public access. *Orloff* v. *Los Angeles Turf Club*, 36 Cal. 2d 734, 739, 227 P.2d 449 (1951), cited with approval in *Cox*, 3 Cal. 3d at 213; *Curran*, 147 Cal. App. 3d at 733. Even the remedies are biased in that they allow treble damages, minimum damages, and attorneys fees to the party attacking the membership restrictions but provide no equivalent compensating incentives for the defendant organization to defend its First Amendment freedoms.

The Unruh Act is thus not congruent with the asserted compelling state interest and does not conform to the neutrality and burden of proof standard for a statute validly regulating First Amendment expression. It is unconstitutionally overbroad.

CONCLUSION

Millions of Americans belong to associational groups formed for a variety of purposes. These include service clubs like Rotary, Kiwanis and Zonta, fraternal organizations like the Elks and Moose, national and ethnic organizations like Norwegian clubs, and local social and recreational clubs, such as country clubs, athletic clubs, or luncheon clubs. In virtually all such organizations, a highly prized aspect of membership is the fellowship that is, in substantial part, based on selective membership criteria. Such criteria may vary, in particular instances, from profession or occupation, to religion or national origin, to age, to residence, to gender, or to some combination of these or other means of identification. All of such organizations contribute to the richness and pluralism of American society which render it unique in the world today.

This case, and the earlier California cases discussed, present grave risks that well-meaning state legislatures and courts will intrude into the membership policies of some, if not all, of such groups. A number of cases already have been brought under various state statutes proscribing discrimination in places of public accommodation. These are discussed in the *amici curiae* briefs supporting appellants' Jurisdictional Statement and need not be reviewed here. It is sufficient to say that *any* exclusionary policy will appear "arbitrary" to the excluded; grass is well known to be greener on the other side of the fence. But merely labeling the membership policies of the Junior League, Zonta, Rotary or Indian Hill Club as "arbitrary" or even "invidious" is not enough. The Constitution and the Bill of Rights exist to get "government off the backs of people." *Schneider* v. *Smith*, 390 U.S. 17, 25 (1968). Freedom to select one's associates is a vitally important right and it must be preserved.

Appellants urge the Court to reverse the California Court of Appeal in this case and, holding that local Rotary clubs are entitled to constitutional protection against the application of the Unruh Act, to make clear that such protection is broadly available to all selective membership organizations in which fellowship plays a significant role.

Respectfully submitted,

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